IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SECOND APPEAL NO.1211 OF 2005

Tukaram Khashaba Hirve .. Appellant

Versus

Dashrath Eknath Malavade .. Respondent

Mr.Mhaispurkar for appellant.

Ms.M.S.Malvade for respondent

CORAM : S.C.DHARMADHIKARI, J.

DATE : 16th August 2007.

P.C.

. Heard Mr.Mhaispurkar for appellant and Mr.Malvade for respondent No.1.

2. This second appeal is at the instance of original defendant who has a decree against him which has been passed in a civil suit for specific performance instituted by respondent No.1 - original plaintiff. The trial court decreed the suit on 23rd September 1996 by directing respondent - plaintiff to deposit balance consideration in the court or pay the same to the appellant directly and thereafter issued further directions with regard to the execution of the sale deed and possession. The suit was filed in the year 1990.

3. Aggrieved by the decision of the trial court, the matter was carried in Appeal and the same has been dismissed on 23rd March 2005. It is pertinent to note that the appeal itself was pending from 1996.

4. Mr.Mhaispurkar would contend that the claim of plaintiff in the suit was not tenable,

firstly, for the reason that the time was essence of the contract and once the time was essence of contract and amount of Rs.1100 was to be paid as stipulated in the agreement for sale, the same having not been paid, within the time stipulated, the suit was barred by limitation. In this behalf, his contention is that the agreement for sale is dated 18th May 1983. The period of 11 months would expire on 18th April 1984, but the suit having not been filed within three years from 18th April 1984, the claim therein is barred by limitation.

5. His second submission is that the claim was also barred because at the time of institution of the suit, plaintiff was a minor. The suit was filed by plaintiff through his mother Tulsabai. The plaintiff could not have been granted benefit of the provisions of Limitation Act inasmuch as the suit was not filed by the minor but by the mother herself. His

third submission is that the provisions of Bombay Prevention of Fragmentation and Consolidation of Holdings Act (Act for short) would specifically bar a decree being passed inasmuch as the consolidation proceedings were initiated and concluded prior to institution of the suit. Details thereof being brought of record, the suit could not have been decreed as that would defeat the provisions of the Act.

6. I am of the view that each one of these contentions fail to give rise to any substantial question of law. The contentions properly understood would call upon this Court to undertake an exercise of re-appreciating and re-appraising materials. The agreement for sale has been found concurrently as not containing any stipulation that the time was of essence therein. The well settled principle that unless provided otherwise, in an agreement for sale of immovable property, time is not essence of contract. has

rightly been applied. The courts below have found that the appellants have not brought any evidence to show that the time was of essence. The discussion of the trial court on this aspect is very clear inasmuch as the recitals of the agreement would have to be seen in their entirety. So seen and considered, it is clear that time was not the essence of contract. There is no condition forfeiting the earnest money after stipulated time. There is also nothing on record to show that the agreement comes to an end after the stipulated period. Merely mentioning that the sale deed is to be executed within 11 months, without any other stipulation being incorporated, was not held to be enough to conclude that time was of essence of the contract. Further, the plaintiff examined an independent witness as well. The contents of the document having been proved after the oral and documentary evidence was led, would go to show that accepting appellant’s plea now would entail

re-appreciation and re-appraision of the materials. Hence, I am of the view that the agreement in question did not stipulate time for completion of the contract. It was not of essence at all. In such circumstances, there is no merit in the first contention of Mr.Mhaispurkar.

7. Equally, the second contention also must fail. It is raised on the same basis that the agreement contained stipulation making time the essence of the contract. Secondly, the suit was filed by the mother and, therefore, benefit of section 6 of the Limitation Act cannot be invoked. In my view, if the plaintiff- minor had not sued but the mother had sued in her own name, then the contention ought to have been otherwise. If the contention is that the suit claim is barred because time was essence of contract and the suit not being filed within three years from 18th April 1984, then, invoking of applicability

or otherwise of section 6 was not at all necessary. That apart, in the present case, the courts below have held that section 6 of Limitation Act, does not come in the picture as the plaintiff has not filed the suit after attaining majority. In such circumstances, it was not necessary to undertake any exercise about the applicability of section 6 of the Limitation Act, 1963. The same is projected before me in the same manner that is urged before the courts below. The argument proceeds on the basis that time was of the essence of the contract and that is why the suit was time barred. In my view, having found that the time was not the essence and the suit was filed after the performance was refused, admittedly, within a period of three years therefrom, then the claim has rightly been considered and decreed.

8. With regard to the third plea with regard to the applicability of the Act and the decree

being bad on that count is concerned, I am of the view that even that has no force. The lower appellate court as well as trial court were aware of the proceedings and provisions of the Act. The point was really pressed before the lower court. The lower appellate court observed that the appellant himself has purchased the suit land from father of respondent plaintiff and some land had been agreed to be sold to the respondent by him. Secondly, after selling the land of the appellant out of the entire suit land nothing had remained with the defendant. In such circumstances, the court below concluded that there is no question of Fragment being created. The argument was based upon the pleas that S.No.280/2 was divided into three parts viz., 280/2A, 2B and 2C. The suit land bearing Block No.1174 formed by land bearing S.No.280 and 2A and S.No.280/1A. The argument was that 63 R. out of land S.No.280/2 was amalgamated to the land bearing Block No.1174 and 63 R. out of

S.No.280/1A was amalgamated to the land bearing S.No.1174 and there was no agreement to sell the land bearing S.No.280/1A. Therefore, the plaintiff cannot claim any specific performance of the agreement and the suit should be remanded.

9. This argument was countered by the learned Advocate for respondent plaintiff before lower appellate court after inviting attention of the courts below to the 7/12 and other extracts pertaining to the suit property. The pleas raised in the written statement were also referred to and that is how the argument of the appellant was countered.

10. The lower appellate court in its judgement in paras 29 and 30 has rightly come to the conclusion that this is nothing but an attempt to defeat the claim and delay passing of the decree for specific performance. In any event, it is well settled that if the land is

covered by the provisions of such enactment, then subject to the permission and approval of authorities thereunder, a decree for specific performance can always be granted. Reliance placed upon the decision of Single Judge (Lataru Sapaku Thakur Vs. Hansaram Sakharam Pardhi, reported in 1983 Mh.L.J.423) of this Court by Mr.Mhaispurkar is misplaced. The learned Judge concluded that the entire suit land was subject matter of the proceedings under the Act. The suit land was one acre. The single Judge concluded that permitting the sale would mean that the scheme under the Act cannot be implemented. The scheme being sought to be defeated that such a conclusion has been reached.

11. In any event, there is serious doubt about the conclusion of the single Judge that a decree of specific performance cannot be passed because the land is covered by the Fragmentation Act. These provisions stipulate

approval/permission of the Collector and his competence to grant the same. In such circumstances, passing a decree is permissible and its execution and implementation can always be made subject to such permissions and approvals. Even that question would not arise in the facts and circumstances of this case. Thus even on this count the decree cannot be assailed.

12. All three submissions having found to be without any merits and not raising any substantial question of law, there is no question of entertaining the second appeal. Jurisdiction of this Court cannot be utilised for having a further round to re-appraise and re-appreciate the evidence. Second Appeal is thus devoid of any merits and the same is accordingly dismissed.

13. In view of dismissal of second appeal C.A. does not survive and the same is dismissed as such.

(S.C.DHARMADHIKARI, J)